

**MINUTES**  
**FEBRUARY 3, 2006**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:02 a.m., on Friday, February 3, 2006, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Heidi Kaiser, Robin Shropshire, Bill Rossbach, Kim Lacey (via telephone), Gayle SkunkCap and Don Marble

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Liaison Present: Tom Livers, DEQ Deputy Director

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Richard Oppen, Director; John North, Chief Legal Counsel; Jim Madden, Legal; Claudia Massman, Legal; Jane Amdahl, Legal; John Arrigo, Enforcement Division (ENF); Steve Welch, Permitting & Compliance Division (PCD); Don Vidrine, Air Resources Management Bureau (ARMB), PCD; Charles Homer, ARMB, PCD; Eric Merchant, ARMB, PCD; Julie Merkel, ARMB, PCD; Debbie Skibicki, ARMB, PCD; Jan Brown, ARMB, PCD; Bonnie Lovelace, Water Protection Bureau (WPB), PCD; Kari Smith, WPB, PCD; Warren McCullough, Environmental Management Bureau, PCD; Jon Dilliard, Public Water Supply & Subdivisions Bureau (PWS), PCD; Rachel Clark, PWS, PCD; Art Compton, Planning, Prevention & Assistance Division (PPAD); Christian Levine, Water Quality Planning Bureau (WQPB), PPAD; Bob Bukantis, WQPB, PPAD; Sandi Olsen, Remediation Division (REM); David Bowers, REM; Cynthia Brooks, REM.

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Bud Clinch, Montana Coal Council; Rich Southwick, CNP/GNPD; Mike Stahly, FEC; Candace Payne, Southern Montana Electric (SME); J. Chris Pfahl, ASARCO; Mandy Alvino, Helena National Forest; Kendall VanDyk, Northern Plains Resource Council; Joe Dirksen, SME; William FitzGerald, SME; Dave Kelsey, SME; Jay Bodner, Montana Stockgrowers; W. John Tier; Joe Kolman, Legislative Services Division (LSD) Legislative Environmental Policy Office (LEPO); Tim Gregori, SME; D. McCarthy, Atlantic Richfield; Matt Clifford, Clark Fork Coalition; Jon Morgan, Clark Fork Coalition; Don Allen, Western Environmental Trade Association; Todd Everts, LSD, LEPO; Joe Lierow, Bison Engineering; Abigail Dillen, Earthjustice; Bill Connors, Centennial Power; Mark Lambrecht, PPL Montana; Anne Hedges, Montana Environmental Information Center (MEIC); Robin Meguire, MEIC; Tony Halser, Yellowstone Valley Electric Coop; Ray Walters, Stanley Consultants.

- I.A Review and approve minutes of November 9, 2005, Colstrip Tour.
- Chairman Russell called for a motion to approve the minutes from the November 9 Colstrip tour. Ms. Lacey so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- I.B Review and approve minutes of November 14, 2005, teleconference meeting.
- Chairman Russell called for a motion to approve the minutes from the November 14 teleconference meeting. Mr. Marble so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- I.C Review and approve minutes of December 2, 2005, meeting.
- Chairman Russell called for a motion to approve the December 2 meeting minutes. Mr. Marble so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE
- II.A.1.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.
- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.b In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., BER 2003-14 HW.
- Ms. Orr said an answer brief and a reply brief were submitted in response to the Department's motion for partial summary judgment. She said a prehearing conference is scheduled for February 7, 2006.
- II.A.1.c In the matter of violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant, BER 2004-15 WQ.
- Ms. Orr said she has given the parties until March 3 to either submit a settlement or to propose a new hearing date.
- II.A.1.d In the matter of violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.
- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.e In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.
- Ms. Orr had no further information beyond that provided in the agenda.

II.A.1.f | In the matter of the request for hearing of Jay Gasvoda, d/b/a Gasvoda Construction, BER 2005-17 OC, regarding the Notice of Violation and Statement of Proposed Penalty.

Ms. Orr said the Department had filed a motion to compel, but had not received an answer brief.

II.A.1.g | In the matter of the appeal by the Town of Ennis, BER 2005-18 WQ, regarding MPDES Permit No. MT0030732.

Ms. Orr said the parties requested an extension to submit a proposed settlement or prehearing and hearing schedules. She said she granted an extension giving the parties until February 6.

II.A.1.h | In the matter of the appeal by Westmoreland Resources Inc., BER 2005-19 SM, regarding the issuance of a Notice of Violation and Statement of Proposed Penalty.

Ms. Orr had no further information beyond that provided in the agenda.

II.B.1 | CBM Rulemaking Update

Mr. Compton explained that the extended comment period for this rulemaking had closed, that the Department had started the review process of over 220 comment documents, that it will collaboratively deliberate a recommendation, and will prepare responses to the comments based on that perspective.

Chairman Russell called for public comment on this matter. There was no response.

II.B.2 | Status report on the development of a mercury emissions rule for coal-fired power plants.

Director Oppen reminded the Board that he had requested time for the Department to work on narrowing the differences between the goals of the original petitioners and the needs of other interested parties. He thought the Department had found some reasonable middle ground. He made a couple of points: 1)DEQ acknowledges that mercury control is going to require a huge capital expenditure on the part of the electrical generators on the state; and 2) DEQ tried very hard to balance the needs of the producers and the population of the state.

Director Oppen said the rule being discussed today adheres closely to the federal Clean Air Mercury Rule, CAMR. He said the CAMR is not generous in its mercury credit allocations to Montana, which will require some fairly stringent mercury control on generating units in Montana. He provided more details about the CAMR and its impacts to Montana, and more information about the rule the Department plans to propose at its March Board meeting.

Discussion took place regarding: the federal cap and trading and whether it will really be protective of public health; whether delaying compliance will help matters; and when current plants and future plants would have to become compliant.

Ms. Skibicki discussed the mercury limits and control technologies imposed on Rocky Mountain Power, Roundup Power and Southern Montana Electric. She said the plants would have to comply with whatever mercury rule the Board approves. She discussed the similarities and the differences between the CAMR and the state rule that the Department was planning to propose, and she responded to Board members' questions.

Mr. Homer explained the process of how things would proceed from this point. He said the Department would request initiation at the March meeting; there would be a hearing sometime around the June meeting; and final action would be taken at the July meeting. He also said that in order to meet the initial allocations deadline of October, the Board would need to take final action at its July 2006 meeting. He said the department would draft the notice with the widest scope possible, to allow the Board the latitude to make whatever changes necessary to make the final decision.

Discussion took place regarding recommended fish consumption and possible changes to it due to increased mercury controls.

Ms. Hedges said the Montana Environmental Information Center (MEIC) would not oppose moving forward with the rulemaking process. She said MEIC would address the issues it has with the rulemaking during the public process.

Mr. Clinch said the Montana Coal Council did not agree with everything coming forth in the rules, but it would work through the public process.

Mr. Gregori spoke in favor of the rulemaking.

II.B.3 Status report on the study of the impacts of the adoption of New Source Review Reform.

Mr. Merchant recapped the outcome of the request for initiation of rulemaking for this item at the December 2005 Board meeting, where a petition was submitted requesting that the Department conduct a detailed, Montana-specific NSR Reform impact analysis and that the Board requested the Department evaluate the request and determine whether it was feasible considering existing staff resources. He said that based on that directive, the Department contacted the petitioners for specifics of what they wanted addressed. Based on the petitioner's responses, the Department believed that some of the requested analyses had already been accomplished, while others could readily be accomplished, and still others could not be accomplished at this time given the limited staff and the amount of effort required. Mr. Merchant said the Department believes it must use its limited resources toward more environmentally beneficial purposes and it maintains that the NSR Reform rules will not result in a

significant impact to Montana.

Mr. Homer said the Department understands the implications of adoption of the NSR Reform rules and believes they won't have any significant environmental benefits or significantly change the number of major modifications that go through NSR review, mainly because of the minor source permitting program. He also said that continuing with the existing NSR rules would result in no significant difference in environmental impact or the number of facilities that go through NSR reform.

Mr. Homer said the Department had also contacted other states and most of them were continuing to adopt NSR Reform rules, although some states have done an equivalency determination, which is a demonstration to EPA that indicates a state believes its rules are at least as stringent as the federal rules.

Mr. Homer explained that Montana was required to submit a plan to come into compliance with NSR Reform by January 2, 2006, and since it was already overdue, the Department believes it is necessary to act quickly in order to maintain program delegation and integrity. He said the Department intends to submit an equivalency demonstration to EPA, which is an administrative procedure and requires no action by the Board. He said the Department does not believe the EPA will accept it.

Ms. Hedges provided information she gathered from 28 other states, with detailed information from Oregon's equivalency demonstration. She said MEIC encourages the Board and the Department to move forward with just an equivalency demonstration at this time.

Ms. Dillen spoke in favor of the Department moving forward with just an equivalency demonstration at this time.

#### II.B.4 Upper Blackfoot Mining Complex (UBMC) Briefing.

Mr. Livers said the Department has had increasing concern over the status of the work at the UBMC and intends to ask the Board at its next meeting to revoke the temporary standards. He said this is a very significant step, so the Department wanted to brief the Board in detail prior to making the request.

Mr. Levine said there were representatives from ASARCO and from the U.S. Forest Service. He provided an outline of the situation with the UBMC and discussed it in further detail. He also discussed the implementation plan, the actions completed up to this point, the present situation, and the trust fund. He said that if the process continues at the current pace, the schedule would not be met.

Mr. Levine discussed Board options: 1) keep the temporary standards as they are; 2) modify the temporary standards; or 3) revoke the temporary standards.

Discussion took place regarding Beartrap Creek and the possibility of rerouting it around the dam, and about the Mike Horse Creek. Also discussed were the efficiency

of the wetland cells and treatment system, the dam safety issues, and the desired or expected outcome of rescinding the standards.

Ms. Amdahl responded to questions regarding the bankruptcy and the effects of rescinding the standards on enforcement attempts.

Mr. Pfahl said there had been delays with this project, but that it had been moving forward for some time now and rescinding the standards would only further complicate matters. He said there would be ASARCO corporate monies this year to work with and that ASARCO was proposing enhancements to the water treatment system. He said ASARCO hoped the Board would not rescind the standards

Discussion took place regarding where things stood with the Forest Service, why work at the site is behind schedule, and what it would take to move things forward to get on schedule. Ms. Alvino also addressed these issues, as well as the dam safety issues and the RIFS assessment.

Mr. Bowers discussed the ECA and why it is just now happening.

Mr. Clifford said that in the early 1990s it was decided that voluntary cleanup of this site would be the best; that in 1995 ASARCO had the Legislature pass the Temporary Water Quality Standards Act; and that in 2000, his predecessor had asked a previous board to not grant the temporary standards for this site. He suggested the Board revoke the temporary standards and move on to the next step.

Chairman Russell polled the Board and it was decided that the Department would come forth with a request to initiate rulemaking to revoke the temporary standards at either the March 23 or June 6 meeting.

III.A.1 In the matter of final action regarding the amendment of rules at ARM 17.38, Subchapters 1 and 2, pertaining to public water supply systems.

Ms. Clark said the major changes proposed in these rules were changes to Circular DEQ-1, Standards for Community Water Supplies, and DEQ-3, Standards for Non-Community Systems. She said the current version of DEQ-1 was adopted in 1982 and has had only minor revisions since then. She said public notice was sent to about 2,000 public water supplies; seven written comments were received; and two oral comments were given at the November 18 hearing. She said the Department recommends adoption of the proposed rules with revisions.

Discussion took place regarding rule 17.38.229 concerning disinfection and chlorine.

Chairman Russell called for public comment on this rulemaking. There was no response.

Chairman Russell called for a motion to adopt the amendments as proposed, accept

the Presiding Officer's report, the 521 and 311 analyses, and the responses to comments. Ms. Lacey so MOVED. Ms. Kaiser SECONDED the motion. Further discussion took place. The motion CARRIED with a unanimous VOTE.

III.A.2 In the matter of final action regarding the amendment of ARM 17.30, Subchapter 13, pertaining to concentrated animal feeding operations.

Ms. Smith provided a brief summary of the rule changes and said the Department requests that the Board adopt the amendments as proposed.

Discussion took place regarding the feedlot locations in relation to state waters, and regarding Senate Bill 320.

Chairman Russell called for public comment.

Mr. Bodner said he was concerned that SB 320 had not been implemented in the rules. He confirmed that he had submitted written testimony.

Chairman Russell called for a motion to adopt the amended rules, the Presiding Officer's report, the 521 and 311 analyses and the responses to comments. Mr. Marble so MOVED. Mr. Rossbach SECONDED the motion. Further discussion took place regarding the implementation of SB 320. The motion CARRIED with a unanimous VOTE.

III.A.3 In the matter of final action regarding the updating of certain water quality standards in Circular WQB-7 (DEQ-7) and the amendment of rules at ARM 17.30, Subchapters 5, 6, 7 and 10 pertaining to mixing zones, surface water quality standards, nondegradation requirements, and ground water rules.

Mr. Bukantis requested that the Board adopt the Department's modifications to the water quality standards as specified. He provided a brief summary of the changes.

Mr. Levine responded to Board questions and further discussion took place.

Chairman Russell called for public comment on the rulemaking. There was no response.

Chairman Russell called for a motion to adopt the amended rules, the Presiding Officer's report, the 521 and 311 analyses and the responses to comments. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.1 In the matter of final action regarding violations of the Montana water Quality Act by Bar S Livestock, Inc., Toole County, BER 2005-06 WQ.

Ms. Orr said she had an order of dismissal prepared and provided a summary of the

case.

Chairman Russell called for a motion to authorize the Board chair to sign the order. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.B.2 In the matter of final action regarding violations of the Montana Operator Certification and Public water Supply Laws by Richard Kelly at the Ten Mile-Pleasant Valley Lagoons, Lewis and Clark County, BER 2005-13 PWS.

Ms. Orr said there was a Proposed Findings of Fact and Conclusions of Law included in the packet for the Board's consideration and an order for the Board to sign. She said the appellant had not objected to anything in the proposed findings and was not here to speak.

Chairman Russell called for a motion to authorize the Chair to sign the order. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.1 In the matter of the request for hearing Gallatin County regarding fees for Wastewater Permit No. MTR101290, BER 2005-20 WQ.

Ms. Orr said she is expecting a stipulation for dismissal of this case.

- III.C.2 In the matter of the appeal by the Montana Environmental Information Center regarding Air Quality Permit No. 3182-01, issued for the Roundup Power Project, BER 2005-21 AQ.

Chairman Russell called for a motion to appoint Ms. Orr permanent hearing examiner for this case. Mr. Marble so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.3 In the matter of the request for hearing by Oro Management, LLC, regarding alleged violations and an assessed penalty, BER 2006-01 MM.

Chairman Russell called for a motion to appoint Ms. Orr permanent hearings examiner for this case. Mr. Skunkcap so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.4 In the matter of the request for hearing by Bear Cub, LLC, regarding the Sunrise Lots Subdivision waiver denial, Missoula County, BER 2006-02 SUB.

Mr. Rossbach recused himself from this case on the basis of his position as Chair of the Health Board in Missoula.

Chairman Russell called for a motion to appoint Ms. Orr permanent hearings examiner for this case. Ms. Kaiser so MOVED. Mr. Skunkcap SECONDED the



motion. The motion CARRIED with a unanimous VOTE.

IV. General Public Comment

Chairman Russell called for general public comment.

Mr. Kelsey said there had been some information in the news lately about Southern Montana Electric that had been unflattering for them and made comments to that end.

Further discussion took place and Mr. Holzer responded to Board questions.

V. Adjournment

Chairman Russell called for a motion to adjourn. Ms. Kaiser so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 2:07 p.m.

Board of Environmental Review February 3, 2006, minutes approved:

---

JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

---

DATE